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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 92

THE UNITED STATES, *Appellant*,

v.

WABASH RAILWAY COMPANY

Appeal from the Court of Claims

BRIEF FOR APPELLEE

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OPINION BELOW

The opinion of the Court of Claims is found at page 10 of the Record and in 59 Ct. Cls., 322.

Grounds of Jurisdiction

The case is here by the Government's appeal, taken June 2, 1924, under Sections 242 and 243 of the Judicial Code, from final judgment entered May 5, 1924.

STATEMENT OF CASE

This case is here on the Government's appeal from a judgment of the Court of Claims in plaintiff's favor. On the merits of the case there is no defense, appellee being

entitled to recover both under the decisions of this court in *Atchison, Topeka & Santa Fe Ry. v. The United States,* 256 U. S., 205, and under the terms of the military agreements set forth in the findings, between the War Department and carriers, including appellee. See *International & Great Northern Ry. v. The United States,* 56 Ct. Cls., 336.

The petition in this case was filed March 17, 1923, and the ground of the Government's appeal is that the suit is barred by that provision of the Transportation Act of 1920, approved February 28, 1920, reading as follows:

> "(3) All actions at law by carriers subject to this act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, unless the carrier, after the expiration of such two years, or within ninety days before such expiration, begins an action for the recovery of charges in respect of the same service, in which case such period of two years shall be extended to and including ninety days from the time such action by the carrier is begun. In either case the cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after. A petition for the enforcement of an order for the payment of money shall be filed in the district court or State court within one year from the date of the order, and not after."
>
> (Ch. 91, 41 Stats. L., Vol. 1, 492.)

and by what seems to be a clarifying act of June 7, 1924, the material part of which is as follows:

> (3) (a) All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.
>
> * * * * * * *

(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

* * * * * * *

(h) The provisions of this paragraph (3) shall extend to and embrace cases in which the cause of action has heretofore accrued as well as cases in which the cause of action may hereafter accrue, except that actions at law begun or complaints filed with the commission against carriers subject to this Act for the recovery of overcharges where the cause of action accrued on or after March 1, 1920, shall not be deemed to be barred under subdivision (e) if such actions shall have been begun or complaints filed prior to enactment of this paragraph or within six months thereafter."

(Ch. 325, 43 Stats. L., Vol. 1, 633.)

In this case appellee rendered one bill to the disbursing officer, who paid it in full. Later it rendered another bill and the second bill was allowed in full, and, according to the Government's own contention, *paid* in full, this payment being partly in cash and partly by the cancellation of an *alleged* obligation of appellee's in the amount of $7,663.56 growing out of the alleged overpayment of the previous bill (R. 9).

Appellee's reply to the Government's contention therefore is, *first*, that the 3-years' limitation in the Transportation Act and in the subsequent act of June 7, 1924, does not apply at all to railroad claims against the Government doing business with carriers on credit, and, *second*, even if such limitation does apply to such claims, it has no bearing on this case, which is founded upon an appropriation of so much of plaintiff's money, which appropriation can be defended only upon the basis of its propriety. This second point was made in the court below, strenuously argued by both sides and sustained by the court. In their brief filed in this case Government counsel seem to have overlooked it altogether.

Transportation for the War Department is obtained from carriers upon the Government's request therefor, evidenced, in the case of a freight shipment, by the tender of a "Government" bill of lading covering the property to be shipped, and, in the case of passenger transportation, by what is known as a Transportation Request. The form and contents of these documents (though not the substance and intent) may have changed to some extent since they were set forth in 14 Comp. Dec., 967, et seq. The latest revision of their forms antecedent to the transportation herein involved is set forth in Treasury Departmental Circular No. 49, of 1915, issued by the Comptroller with the approval of the Secretary. The Transportation requests contained the following, on the back thereof:

"General Instructions to Carriers

* * * * * * *

6. Transportation Requests must not be passed through the banks for collection from the Government.

* * * * * * * *

9. Bills must be submitted by the general officers of carriers, and on forms furnished by the Government, to be obtained from the Public Printer, Washington, D. C.

10. Original requests must accompany, and the numbers thereof entered on, each bill."

(Page 8.)

The freight bills of lading contained the following on the back thereof:

"General Conditions and Instruction Conditions

It is mutually agreed and understood between the United States and carriers who are parties to this bill of lading that—

1. Prepayment of charges shall in no case be demanded by carrier, nor shall collection be made from consignee. On presentation to the office indicated on

the face hereof of this bill of lading, properly accomplished, attached to freight voucher prepared on the authorized Government form, payment will be made to the last carrier, unless otherwise specifically stipulated."

(Page 14 of said Treasury Circular.)

Thus, it will be seen that it is provided in both cases that credit is extended to the Government with no limitation on the period of credit.

In actual practice bills of carriers are presented to some designated disbursing, or subordinate accounting, officer, whose disbursements are regulated by the head of the Accounting Department of the Government, and the bills must be supported by the bills of lading or the transportation requests. If there is any irregularity, or apparent irregularity, about the bill of lading or transportation request, even though it be no fault of carrier, or in event of failure of the issuing officer to report the service to the disbursing office, payment is withheld until the irregularity can be straightened out or a report of the service obtained. Sometimes the documents are lost and must be supplied in accordance with regulations. Frequently payment is held up to await a ruling of the head of the Accounting office, or, perhaps, for the decision of a court. While it may be a variation from the ordinary, it is by no means unusual for a determination of the basis of payment, and consequently for the payment itself, to be delayed for more than three years after the rendition of the service—and this without the laches, negligence or fault of either party.

We make this statement, which is but common knowledge, concerning the actual practice, not as an argument that said 3-years' limitation ought not to be held applicable to Government transportation, but to show what can and does happen in the course of the discharge of the valid contracts made by the requests and bills of lading.

It is legitimate for us to suggest, we think, that the purpose of the proponents of the legislation fixing a 3-years

limitation in the Transportation Act for "actions at law" for the recovery of charges seems to have been to substitute a uniform statute in place of the various conflicting and different statutes prevailing throughout the country, and to prevent the assertion of stale claims against private parties. This view finds considerable support in that amendment to Section 3 of the Interstate Commerce Act, found in Section 405 of the Transportation Act, as follows:

> "(2) From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: Provided, That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or territory or political subdivision thereof, or for the District of Columbia."
>
> (Ch. 91, 41 Stats. L., Vol. 1, p. 479.)

It seems to us that this express provision controls that general provision with respect to when the cause of action shall be deemed to accrue, insofar as shipments by the Government are concerned.

There may be *old* claims for transportation charges due carriers from the Government, but there can hardly be such a thing as a *stale* claim as that term is generally understood, because the Government always knows from its own records whether services have been rendered and whether they have ben paid for. It is nver surprised by the presentation of an old claim, because it is necessarily supported by the Government's own evidence that it has not been paid for.

THE QUESTIONS

The questions involved in this appeal are:

(1) Whether the 3-years limitation of actions provided by the Transportation act of 1920 (and the act of June 7, 1924) apply at all to railroad claims against the Government, and if so, to what extent, and

(2) Whether said 3-years limitation, assuming it does apply to railroad claims against the Government, can bar appellee's claim based upon money withheld from it.

ARGUMENT

Summary

I. The 3-years' limitation of actions provided in the Transportation act of 1920, and the act of June 7, 1924, do not apply at all claims of railroads for transportation furnished the Government doing business with them on credit.

(a) The said 3-years' limitation can apply to railroad transportation claims against the Government only as a repeal by implication and in unusual terms of the existing 6-years' limitation, and therefore should not be so construed.

(b) The application of the 3-years' limitation to carriers granting credit to the Government by long continued practice and by express provision of law, would discriminate against them as compared with others sustaining contractual relations with the Government, and could not have been so intended.

(c) Railroad transportation claims against the Government are taken out of the 3-years' limitation by the valid contracts under which the liability is created.

II. The most that can be claimed for the 3-year limitation is that it operates on transportation occurring subsequent to the act.

III. The 3-years' limitation means nothing at all so far as railroad transportation for the Government is concerned.

IV. The act of June 7, 1924, does no more than negative

the idea that might otherwise be asserted, that it was intended to replace with a new date the date provided in the Transportation Act from which the new limitation was to take effect.

V. Even if the 3-years' limitation does apply to railroad transportation for the Government, it does not bar this claim based upon money withheld.

(a) The said 3-years' limitation can apply to railroad transportation claims against the Government only as a repeal by implication and in unusual terms of the existing 6-years' limitation, and therefore should not be so construed.

It is said in Government's brief, p. 10, that: "Opposing counsel would read the language as follows: 'All actions at law by carriers subject to this act for recovery of their charges or any part thereof, *except actions against the United States*, shall be begun within three years from the time the cause of action accrues and not after.' "

Since we contend that, for a variety of reasons, the said provision does not apply at all to railroad claims against the Government, we can afford to admit that our position is correctly stated; but appellee's counsel have hardly deemed it necessary to interpolate into the act a clause to expressly exclude something which was not included in it. Government counsel, on the other hand, would, and in fact do, read the provision as follows: "All *suits* by carriers subject to this act for recovery of their charges or any part thereof, including suits against the United States doing business with them on terms of unlimited credit, expressly allowed by law, shall be begun within three years from the time the service was rendered and not after, the provisions of Section 156 of the Judicial Code to the contrary notwithstanding."

It must be admitted, we think, that if the provision in the Transportation Act applies to carrier's claims against the Government it must be because, by implication and in unusual terms, it repeals to an extent Section 156 of the

Judicial Code. It is elementary that repeals by implication are not favored and will not be sustained except upon the clearest showing that the statute in question was so intended. Not only is there nothing to induce the conviction that this statute was intended to repeal the existing limitation, but there is every reason against it. We have mentioned the unusual terms employed, by which we mean the use of the words "action at law." It may be that a suit in the Court of Claims *can* be termed an "action at law," but no man, living or dead, ever saw or heard it referred to as such, either legislatively, judicially or in common parlance. Such a proceeding is unifomly known as a suit.

Disregarding the unusual term, Government counsel seek to justify the applicability of the 3-years limitation upon that sentence containing it alone. Little consideration is given the necessarily related provisions of the act and of the act of June 7, 1924, found in immediate juxtaposition to the paragraphs relied upon and intimately related to them, and at other places in the Transportation Act itself. Both acts fairly bristle with evidence that Congress did not have in mind any idea of interrupting the existing orderly course of dealing between carriers and the Government and imposing upon both of them the burden of this 3-year limitation of actions. In both acts—somewhat more expansively in the later one—the provision originating and continuing the nation-wide 3-years limitation is followed immediately by provisions prescribing the course of action to be followed in different events and under certain specified conditions—not one of which has any possible relation to the methods authorized and prevailing between carriers and the Government in the handling of their business relations.

But this is not all. Section 405 of the Transportation Act contained that provision which we have already quoted in our statement of the case, concluding with that proviso:

> "That the provisions of this paragraph shall not be construed as prohibiting any carrier from extending

> credit * * * on freight transported for the United States."

There is not the faintest suggestion that carriers should take care that they received settlement within three years. On the contrary, no limitation whatever is placed upon the term of credit and presumably the obligations incurred were to be discharged or enforced by the usual and existing methods. Must Congress be understood, after leaving the matter in this situation, to have intended to "slip up" on carriers and by the employment of unusual terms, repeal by implication their existing remedy against an abuse of that credit?

The burden of showing the repeal is on the Government. It attempts to sustain that burden by no more than the repetition of a single sentence containing terms of doubtful meaning.

(b) The application of the 3-years' limitation to carriers granting credit to the Government by long continued practice and by express provision of law, would discriminate against them as compared with others sustaining contractual relations with the Government, and it could not have been so intended.

Section 145 of the Judicial Code, defining the jurisdiction of the Court of Claims, provides that it shall have jurisdiction to determine—

> "*First.* All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States * * *"

while by Section 156 of the Judicial Code, it is provided:

> "Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless a petition setting forth a statement thereof is filed in the court * * * within six years after the claim first accrues. * * *"

This last section, while technically more of a jurisdictional statute, has always operated and has become known as a statute of limitations, and in the Government's brief (p. 1) it is referred to as "the general statute of limitations."

There can be no doubt that this suit, whether based upon an unpaid part of a transportation claim, or upon the promise implied by the Constitution and the law of the land to make plaintiff whole if the withholding of its money in the course of payment of the later bill be erroneous, is a suit based upon a contract.

Thus, Congress has provided that anybody aggrieved at the outcome of his contractual relations with the Government might have six years within which to assert that grievance by suit. For the settlement of railroad claims for transportation without suit it had provided somewhat elaborate machinery, and it had expressly recognized, ratified and authorized the practice of their granting credit to the Government.

If said three-year limitation be held to apply to carriers' claims against the Government, they will be the *only* contractors excepted from the "general statute of limitations," which would be the rankest discrimination against them. In view of the fact that they were allowed by law to grant credit to the Government, of the further fact that the machinery established by law to discharge the Government's obligation sometimes takes more than three years to operate, and, further, of the extremely inapt language employed to constitute a repeal by necessary implication, we cannot believe that Congress had any intention of inflicting such discrimination.

(c) Railroad transportation claims against the Government are taken out of the 3-years limitation by the valid contracts under which the liability is created.

In our statement of the cast, ante, we have quoted from the contracts under which transportation for the Government is obtained and furnished, as set forth in the bills of lading and transportation requests, and will not repeat them here.

The validity of these contracts cannot be questioned. They are, in fact, so far as their credit feature is concerned, expressly ratified by Sec. 405 of the Transportation Act itself. There is nothing in them from which the implication can be raised that carriers recognized they were bound to assert their rights by judicial proceedings (else lose them), within any specified time, or according to changing laws. On the other hand, however, the judicial enforcement of the contracts was necessarily subject to the law in effect at the time the contract was made, and that was at any time "within six years after the claim first accrues." By reason of the credit feature this contract certainly was not at that time designated by the Transportation Act for the 3-years limitation to operate upon. And, transportation for the Government being the subject of express contracts, the remedies upon them continue the same throughout in the absence of any legislation which can reasonably be construed as aimed directly at them.

II. The most that can be claimed for the 3-year limitation is that it operates on transportation occurring subsequent to the act.

The Transportation Act provides when a cause of action "*shall be* deemed to accrue." It thus necessarily contemplated future causes of action. For this reason and for the reason that the Transportation Act was the first attempt to fix *by statute* when a cause of action should accrue, it certainly cannot be claimed with reason that it applied to anything but causes of action thereafter arising. This is so plain that it argues itself and leaves nothing more to be said on the subject. The authorities construing statutes of different verbiage have no application.

III. The 3-years limitation means nothing at all so far as railroad transportation for the Government is concerned.

The St. Louis, San Francisco & Texas case (No. 91) is a freight transportation case, while this case (No. 92) is a passenger transportation case. It would naturally be assumed that the statute of limitations (whatever it might be) applying to one would apply also to the other.

By Section 405 of the Transportation Act, credit is expressly allowed to be extended for freight transportation for the United States. In view of the fact that no limitation of time for this credit is suggested, it must be unlimited in that respect. In view of this and of the fact that it sometimes takes more than three years for the Governmental machinery to operate, it is not seen how claims against the Government based on freight transportation can be subjected to a 3-year limitation. Wherefore, it would seem that the "general statute of limitations"—to quote from page 1 of Government's brief—"allowing six years" would apply. And, it would seem that unless for some good reason passenger transportation is subject to a different limitation, the 6-year limitation applies to it also.

On the other hand, unless a 3-year limitation be fixed by the Transportation Act for Government passenger transportation, it would naturally remain subject to the same limitation to which it had always been subject—six years; and, unless for some good reason a different rule were provided for freight transportation the latter would be subject to the same limitation.

But we cannot find that passenger transportation, which is always (except for the Government) "cash across the counter" business, is the subject of any concern in the Transportation Act. One *sentence* standing alone—that fixing a 3-year limitation of actions only—might indicate otherwise. But Congress could hardly have intended to provide a limitation for the enforcement of what does not exist, and taking the amendments to the Interstate Commerce Act as a whole, it was freight transportation around which all safeguards were thrown and with which Congress for obvious reasons was concerning itself.

Thus, it comes down to this: (1) That for freight transportation the six-years statute was left in force—and the same statute should apply to passenger transportation unless some other were specially provided for it; (2) that for passenger transportation, the six-years statute was left in force—and the same statute should apply to freight

transportation unless some other were specially provided for it.

Since neither alternative is true, it naturally follows that so far as Government transportation is concerned, the 3-years limitation in the Transportation Act (and in the Act of June 7, 1924) does not mean a thing.

IV. The act of June 7, 1924, does no more than negative the idea that might be otherwise asserted, that it was intended to replace with a new date the date provided in the Transportation Act from which the new limitation was to take effect.

We think the act of June 7, 1924, so far as the fixation of a period of limitations for actions at law is concerned, was no more than a re-enactment of the similar provision in the Transportation Act, and being more than three years subsequent to the latter act, paragraph (h) in the latter act simply repelled any idea that might otherwise exist that it was the intention to substitute the date of its approval for the date provided in the Transportation Act, from which the 3-years limitation was to begin to operate.

Of course, the act of June 7, 1924, had also the purpose of giving claimants against railroads three years in which to assert their claims, but so far as the limitation imposed upon carriers was concerned, it was the evident purpose only to provide beyond question that it was to be left as it was before and no more.

V. Even if the 3-years limitation does apply to railroad transportation for the Government, it does not bar this claim based upon money withheld.

This was a point strenuously argued on both sides in the lower court and sustained by that court (Opinion, R. 10). There it was argued that the withholding of the plaintiff's money out of the amount due on the later undisputed bill was a "tort." If that is so, all deductions are "torts."

The point is not noticed at all in the Government's brief We consider it conclusive of the case, regardless of the application of the 3-years limitations.

The facts, briefly, are that plaintiff rendered its bill

S-394 upon the basis claimed to be correct and was paid its bill in full by a disbursing officer. Later, the accounting officers erroneously held that plaintiff had been overpaid on bill S-394 the sum of $7,663.56, and upon plaintiff's refusal to remit the amount thereof *it was otherwise collected from plaintiff*, the machinery employed being to take it out of another sum admittedly due plaintiff. That other sum happened to be due for transportation. What it was due for is of no consequence. It had passed beyond the stage of a mere transportation claim to an account stated, and agreed upon. What the Government said, in effect, to plaintiff was that it was paying the later account in full, partly in cash and partly by the cancellation of an obligation of plaintiff's. There was no dispute about, or refusal to pay, plaintiff's later claim. The Government simply held out that it was paying the later claim in full in the way described. It is estopped to deny what it had asserted. Without the course followed by the Government plaintiff would have had no complaint. If the money appropriated by the Government was not lawfully due from the plaintiff to the Government (and it was not), the law of the land implied a promise to pay it. Plaintiff could sue either for an alleged unpaid balance of the second bill or for the "deduction" as for money had and received to the use of plaintiff, or both, which it has done, and suit can be defended only by justifying the appropriation of plaintiff's money out of the fund due it. In a suit for the money erroneously appropriated, without which plaintiff would not have had any claim at all, plaintiff has six years from the appropriation in March, 1918, to file that suit. The Government cannot deny the position it took nor the implied promise growing out of its action.

THE GOVERNMENT'S BRIEF

The Government has filed in this case a brief that upon first impression is right persuasive. Counsel for appellee has been prevented by a disabling illness from giving it the extensive analysis and criticism of which it seems suscepti-

ble. It may be briefly said, however, that the brief seems somewhat aside the point. The burden, we think, is upon the Government to show that as a *necessary* implication from the language employed in the Transportation Act "the general statute of limitations" was repealed. This has been assumed, but not demonstrated. We concede that the Congress does often provide special statutes of limitations for special classes of claims against the Government; but it does so in legislating directly upon the subject and lays down a rule applicable to all in the same situation. We concede also that statutes of limitations are often amended by law so as to establish a rule or effect a change from the previous situation; but these statutes are all clear in their purpose and operate alike upon all in the same situation. But here the Government would have the Transportation Act, in its inapt language, operate as a discrimination against one class, and one class alone, of those sustaining contractual relations with the Government and protected by Section 156 of the Judicial Code. The decisions cited by the Government, therefore, have no true bearing on this case.

CONCLUSION

It is respectfully submitted that the Government has not sustained the burden resting upon it as appellant; that the three-year limitation in the Transportation Act does not apply to railroad transportation claims against the United States doing business with them on lawfully authorized credit, and finally, for these reasons and for the reason that this suit grows out of a deduction which was improper, the judgment of the lower court in this case should be affirmed.

Respectfully submitted,

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